imposition upon them of a sentence of imprisonment under the section.

For these reasons I would not have been inclined, even if the notes of the public examination had been properly before me, to exercise my powers of imprisoning the debtors in the present case.

*Order accordingly.*

Solicitors for the debtors: *Hogan, Adams & Allen.*

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## SI TOH FOK TIAK TRADING AS CHOP WING LOONG v. CHOP SWEE KEE & CO.

[A. C. J. (Bellamy, J.) December 8, 1953]

[Malacca — Civil Appeal No. 4 of 1953]

*Evidence — Fresh trial — Admissibility of evidence in — Reception in evidence of depositions in former trial — Witnesses present — ss. 33 and 167 of Evidence Ordinance, 1950.*

At the rehearing of a case, the learned President instead of taking the evidence of the witnesses viva voce agreed with the consent of Counsel for the parties, to allow the witnesses to confirm the correctness of the depositions of their evidence at the former trial.

**Held:** as the witnesses were available to the Court, the reception of the evidence of their depositions in a former trial ought not to be allowed.

CIVIL APPEAL.

*C. S. Jayaswal* for the appellant.

*W. H. Sault* for the respondents.

*Cur. Adv. Vult.*

The facts appear sufficiently from the judgment.

**Bellamy, J.:** — This is an appeal from the President of the Sessions Court at Malacca.

On the 21st August, 1952 the plaintiff brought an action against the defendants in the Sessions Court at Malacca claiming a sum of $902 being the balance of the price of five Singer sewing-machines alleged to have been sold and delivered by him to the defendants. The defendants put in a defence in which they denied the existence of the alleged contract of sale between themselves and the plaintiff and the alleged delivery of the sewing-machines to them and stated *inter alia* that the sewing-machines were bought by one Hong Boon Pin, a man formerly in their employment, who in so buying the sewing-machines from the plaintiff was acting on his own behalf and without the authority of the defendants. At the hearing on the 22nd September, 1952 the President gave judgment in favour of the defendants and dismissed the plaintiff's suit with costs. The plaintiff thereupon appealed to this Court against this decision and he applied for leave to call fresh evidence. Abbott, J., allowed the appeal [(1953) M.L.J. 59] and made an order that there should be a "fresh trial" and that the plaintiff should be at liberty to adduce fresh evidence as prayed. The case came on for hearing before another President on the 2nd April, 1953 and he found in favour of the defendants, dismissing the plaintiff's claim. From this decision the plaintiff now appeals to this Court.

At the hearing of this appeal a preliminary question was raised by the Court as to the propriety of the admission of certain evidence which was received by the President, upon the application of, and by agreement between, both Counsel of the parties, and an adjournment was granted to enable Counsel to consider and to argue it.

It is necessary to set out the very peculiar course which the proceedings took before the President. The parties were represented by Counsel and appeared, together with their witnesses, before the President on the day appointed for the new trial. Counsel for the plaintiff, having referred to the order of Abbott, J., directing a re-hearing and authorising the plaintiff to adduce the additional evidence of one Ismail bin Hassan, whose affidavit had been filed in this Court by the plaintiff in support of his application for leave to call further evidence, suggested to the President that the evidence of this witness might be given either by affidavit, in which case the witness was available for cross-examination, if required by the defendants, or by examination *viva voce* in open Court in the usual way. Counsel for the defendants, according to the President's note of the proceedings, thereupon expressed his agreement "to accept evidence as so far given". The President's note does not disclose if Counsel for the plaintiff agreed to this course being taken, but I was informed at the Bar that it had been agreed between both Counsel of the parties that the evidence of the parties and of their witnesses in the former hearing on the 22nd September, 1952 should be used and read at the re-hearing on the 2nd April, 1953 and that neither the parties nor their witnesses in the former hearing should be further examined or cross-examined in the new trial. In face of this agreement between Counsel of the parties the President did not insist on their evidence being heard *viva voce* in open Court, but he approved the course agreed upon by Counsel. Thereupon the parties and their respective witnesses were called individually and, the deposition in the former trial having been read to him, each one on oath merely confirmed the correctness of his evidence in the former trial. Ismail bin Hassan was also called and, having confirmed like the others the correctness of his affidavit filed in this Court which was also read, he was cross-examined on his affidavit. Apart from the

fact that such evidence and the affidavit of Ismail bin Hassan were read as I have described in the re-hearing, there is nothing on the record to show that the depositions of the witnesses and the affidavit of the said Ismail bin Hassan were tendered in evidence. It was on this evidence that the President made his decision, and the question is whether this evidence which was admitted by the President, albeit with the agreement of Counsel, was admissible.

In argument before me both Counsel submitted in defence of the course agreed to by them and followed by the President that, although the Subordinate Courts Rules, 1950 do not provide for the reading of evidence taken in another cause in any other case, Order 35 Rule 2 of the Rules of the Supreme Court (which provides for evidence taken in another cause or matter being read *inter alia* in any other case) may be held as applying to a Sessions Court by virtue of the provisions of Order I Rule 2 Sub-rule (1) of the Subordinate Courts Rules.

There appears to be some confusion about this argument. I accept without cavil the proposition that by virtue of Order I Rule 2 Sub-rule (1) of the Subordinate Courts Rules deficiencies in practice or procedure in those rules can be supplied from any other appropriate source so as to do substantial justice between the parties, but the question here is not a matter of procedure but the admissibility of evidence, and Rules and Orders which only profess to deal with procedure cannot nullify the Evidence Ordinance, the provisions of which remain unaffected thereby.

In my opinion, the answer to this question is to be found in section 33 of the Evidence Ordinance, 1950 That section reads:—

"33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable:

Provided —

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) that the questions in issue were substantially the same in the first as in the second proceeding."

The general rule clearly is that all evidence at a trial must be given *viva voce* and the witnesses must be subject to cross-examination in the usual way before the trial Judge, and depositions are admissible only after proof that the parties who made them cannot themselves be produced. In the present case, the parties and their witnesses were before the President, and it is therefore manifest that the reception in evidence of their depositions in a former trial ought not to have been allowed. In my view, furthermore, where there has been a violation of a rule of evidence, it makes no difference that such violation has been consented to by the parties or their Counsel.

Section 167 of the Evidence Ordinance provides:—

"167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Without the evidence which was improperly received by the President, there was absolutely no evidence to justify his decision.

This being so, this appeal must be allowed. The case must be sent back to the Sessions Court for re-hearing before another President.

It is to be regretted that further expense will have to be incurred before this litigation can be determined, but I am satisfied that the President was not to blame, inasmuch as the Counsel for both parties not only proposed but agreed between themselves to the course that he took, a course intended, I have no doubt, to save time and possible expense. In the matter of costs, therefore, I think it right to restore the parties to the position that they were in prior to 2nd April, 1953. I, therefore, order no costs of this appeal and that each party do pay his own costs of the re-hearing on the 2nd April, 1953 in the Court below. The costs in the Court below and of the appeal before Abbott, J., to abide the determination of the suit and to follow the decision of the re-hearing.

*Appeal allowed.*

Solicitor for the appellant: *C. S. Jayaswal.*

Solicitors for the respondents: *W. H. Sault & Co.*

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## TAN AH SEAH v. TEO KAI MIN & ORS.

[O. C. J. (Spenser Wilkinson, J.) December 14, 1953]

[Penang — Civil Suit No. 35 of 1953]

*Landlord and tenant — Determination of head tenancy — Sub-tenants the "statutory tenants" — Standard rent — Interpretation of — ss. 8(3), 13(1)(j) and 14(2) of the Control of Rent Ordinance, 1948.*

In October, 1950, the plaintiff obtained an order for possession against the principal tenant, and that order having been served upon the defendants (the sub-tenants) on the following month, they thereupon became statutory tenants of the plaintiff under section 14(2) of the